Attorney Fees and the Ethics Rules -- Surprise! Some Duties You Wouldn't Have Guessed You Had

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A panoply of professional responsibility rules comes into play when it comes to the ethics of attorneys' fees. But who would have imagined those rules could be violated by (a) failing to tell a client that his case could cost more than the damages he might recover; (b) failing to make a client replenish an "evergreen" retainer; (c) getting bills out late; (d) refusing to modify a fee agreement in order to allow a client more time to pay a bill; or (e) charging the client for research on the (often intricate) procedures governing bankruptcy practice?

TAKING A CASE KNOWING THE CHANCES OF PREVAILING ARE SLIM AN ETHICAL MISSTEP?

Only the broadest, most over-expansive view of Rule 1.1 could ever support a finding that taking a difficult case that might cost more than it was worth could be a violation of Rule 1.1. But that's what happened in Atty. Griev. Comm'n v. Framm, 2016 Md. LEXIS 565, *29 (Md. Aug. 24, 2016). There the Court, overturning the hearing officer's

determination that taking a client's case does not require counsel to perform a "cost-benefit analysis", held as follows:

> Respondent's failure to advise Mr. Wilson at any time during the representation **that the cost of continuing to pursue litigation might vitiate any benefit he may receive** ultimately does not reflect thorough and competent representation.

2016 Md. LEXIS 565, *29.

The problem with such an interpretation of Rule 1.1 is quickly apparent when we remind ourselves that a single act of negligence should never suffice to find a violation of Rule 1.1. Moreover, it is difficult to imagine a case such as this one ever rising to the level of clear and convincing proof (as opposed to she-said-she-said) required to sustain any ethical violation, at least so far as the Rule 1.1 violation goes.

FAILURE TO SEND INVOICES AN ETHICAL VIOLATION?

It certainly is good practice to provide invoices regularly and to include detailed descriptions regarding the work that was done. But is it a violation of Rule 1.4 to do so?

First' let's take a look at the relevant portion of Rule 1.4:

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

> *(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;*
>
> *(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;*
>
> *(3) keep the client reasonably informed about the status of the matter;*
>
> *(4) promptly comply with reasonable requests for information; and*
>
> *(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.*
>
> *(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

Now consider the following case, involving an attorney who failed to make his client replenish his retainer under an "Evergreen" retainer agreement.

> First, Respondent **failed to provide Ms. Klein with periodic invoices** about his attorney fees and he also **failed to request replenishment of his retainer**. The retainer agreement signed by Ms. Klein states that she was to pay Respondent "those monies necessary, on a 30-day, as billed basis to maintain the retainer at its original level." As stated supra, the Court credits the testimony of Mr. and Ms. Klein and found that **Ms. Klein requested invoices between seven and eight times during the course of the representation**. Moreover,

> at Respondent's deposition, he testified "Oh, I don't think so. Pretty sure she didn't. I don't know," in response to whether Ms. Klein had requested an invoice. At trial however, **Respondent testified that Ms. Klein never requested a bill from him**. The Court found that Ms. Klein provided two additional payments of $1,000 to Respondent, for a total payment of $3,500 before Respondent sent her the first invoice billing her for over $11,000. **By failing to provide any monthly statements when requested and failing to request replenishment as needed, Respondent violated MLRPC Rule 1.4 Communication**. Atty. Griev. Comm'n v. Calhoun, 391 Md. 532, 569 (2006) (finding that sending out monthly statements that simply stated what the client owed without providing further details was a violation of MLRPC Rule 1.4).

Atty. Griev. Comm'n of Md. v. Rand, 445 Md. 581, 607 (Md. 2015) (emphasis added).

Presumably, the failure to send invoices when requested resulted in a violation of Rule 1.4 (a) (4) (promptly respond to reasonable requests for information). But assuming the client was otherwise informed about the status of the matter, a request for a bill is not a request for information about the status of the matter, but has to do with the business relationship of the attorney and the client. Being tardy getting bills out, even when the client requests them, might be negligent – but it hardly rises to the level of clear and convincing proof of a violation of Rule 1.4. Indeed, the case describes a classic “he said she said” dispute

– and no matter whose testimony the Court "credited", proof beyond a preponderance was required.

The Court in the Rand case also found the attorney had violated Rule 1.5, governing attorneys' fees, **because he failed to make his client replenish her evergreen retainer.** This somehow equated to an "unreasonable" fee (the Court noted that the factors listed in Rule 11.5 are "non-exclusive", and that the rule could be violated even though the total fees charged were perfectly reasonable). The Court cited as precedent, Atty. Griev. Comm'n of Md. v. Green, 441 Md. 80, 92, 105 A.3d 500 (2014) (finding that the attorney's fees were unreasonable and that the attorney violated MLRPC Rule 1.5 by failing to provide monthly invoices and failing to request the replenishing retainer).

Let's look at the relevant portions of Rule 1.5.

RULE 1.5. Fees

a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

[sections c & d omitted]

I'm sorry, but failing to request that a retainer be replenished does not amount to "charging" a client for anything, which is a prerequisite for a Rule 1.5 (a) violation. The consequence of not sending bills for a period of time and not obtaining a replenished retainer is that the client has the use of funds for a period of time that otherwise they would not have had.

CHARGING FOR "BASIC RESEARCH" INTO "BASIC FEDERAL LITIGATION PRACTICES" OF THE BANKRUPTCY COURTS VIOLATES THE RULES?

One recent decision pegged as a Rule 1.5 violation the charging of fees for "research on court procedures, the complaint, bankruptcy, discovery required, discovery deadlines, status conferences, interrogatories, summary judgment (when no such motion was filed), depositions, discovery remedies, declarations, trial procedure, and trial, which should not be charged." Castro v. Chang Sup Han (In re Chang Sup Han), 2015 Bankr. LEXIS 3210, *19 (Bankr. C.D. Cal. Sept. 22, 2015).

> Attorneys are expected to know elementary principles of law that are commonly known by well-informed attorneys, and to discover those additional rules of law that may readily be found by standard research techniques, and should not excessively bill for acquiring such knowledge. An award of attorneys' fees cannot be reasonable if that fee could not ethically be **charged** to a client * * * These entries suggest that the billing lawyers were new or unfamiliar with bankruptcy court practice or federal court practice in general, and were using this case for training purposes to learn basic federal litigation practices, and should not be ethically charged to a client or to an opposing party under a fee-shifting statute.

2015 Bankr. LEXIS 3210, *19.

How can the Court know this? Bankruptcy procedure is complex; and getting it wrong can be costly as well as damaging to the Client's

case. Perhaps seasoned bankruptcy petitioners keep all aspects of bankruptcy procedural law in their heads; but the application of the rules to specific facts is often not immediately apparent, even to experienced counsel.

These days, local court rules and procedures are often intricate and complex. Indeed, in the "rocket docket" of the United States District Court for the Eastern District of Virginia, it can be downright dangerous for counsel to practice there if they are not well versed in the peculiarities of that District – this has less to do with the written rules than with the effect of the Court's rapid pace on discovery and trial preparation.

Speaking of rules, however, in addition to the federal rules of civil procedure and the federal bankruptcy rules, there are the Courts' local rules as well as standard pretrial orders and standing orders of individual judges that are of critical importance. One federal judge provides, in his initial pretrial order, that counsel who do not advise the Court of an objection to a Magistrate Judge presiding over the case within two days of the initial pretrial will be deemed to have consented. Another federal judge's standard order requires that privilege logs be provided 15 days prior to the deadline for responding to requests for production of documents, on pain of waiver of the privilege!

In short, there is no such thing as "basic federal litigation practices". The Courts, not the lawyers, have layered the system with

complexities; and lawyers ought not have to run the risk of Rule 1.5 violations when they charge for the professional services necessary to divine them.

REFUSAL TO ALLOW A CLIENT TO PAY HER BILL OVER TIME IS A VIOLATION OF RULE 1.8(a)(1)?

Here's another aspect of the rules we might not think has to do with fees: fee agreements are a “business transaction with a client” subject to the dictates of Rule 1.8(a)(1).

First, the rule:

> **RULE 1.8(a)(1): BUSINESS DEALINGS MUST BE FAIR AND REASONABLE TO THE CLIENT.**
>
> *(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*
>
> *(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client*

One recent opinion found that under the dictates of Rule 1.8(a)(1), a firm was obligated to allow a client, who had expected to be able to pay her legal bill out of a lump sum distribution, to make payments over time when the Court determined that a part of the client’s equitable distribution would have to be paid over time:

> The practice of law is a learned profession which is regulated by the Pennsylvania Rules of Professional Conduct. These

> rules present ethical and contractual issues for the lawyer and client that do not exist between people engaged in ordinary sales or service businesses. Hence, the attorney-client relationship is treated differently by the Courts than the relationship between, for instance, a property owner and a construction contractor. Business dealings by lawyers with their clients must be "fair and reasonable to the client" pursuant to Rule of Professional Conduct 1.8(a)(1).
>
> In this case, I found that BGMS was not being fair and reasonable when it flatly refused to accept any sort of payment plan proposed in good faith by Wife. The predicament in which BGMS finds itself was, to a great degree, of its own making. First, it allowed Wife's balance to grow without demanding payment when due and second, it miscalculated the likelihood of a single fund being created sufficient to pay off the balance. I found that, under those circumstances, since Wife was receiving her award over time, it was only fair, equitable, and reasonable to allow Wife time to satisfy her obligation to BGMS.

Ambeliotis v. Ambeliotis, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1101, *14-15 (Pa. County Ct. 2016).

In other words, irrespective of the actual terms of the contract for legal fees, a lawyer is obligated to agree to alter those terms whenever their enforcement would be deemed unfair or unreasonable by a Court or ethics board?

As fair and reasonable as it in fact is to allow a client to make up arrears over time (indeed, the alternative – suing the client – is likely to invite a counterclaim for malpractice or breach of fiduciary duty), one

difficulty with morphing this into an ethical duty under Rule 1.6(a)(1) is that it becomes entirely too difficult to ascertain the Rule's application to a future set of facts. Is a fee agreement between attorney and client to be rewritten because the client's original expectation regarding the source of repayment did not turn out?

Who says the ethics rules are boring? The point of all this is that the rules are steadily being expanded in their application to cover areas of the attorney-client relationship that attorneys are unlikely to anticipate based simply on the language of the rules themselves. Not that anybody likely cares, but this sort of problem raises due process issues, and at minimum increases the headaches caused by the practice of law.